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Supreme Court, U.S.
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No. 03-261

In the Supreme Court of the United States

JEAN FAWCETT,

Petitioner,

v.

COLIN MCROBERTS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Reply 1

Conclusion 6

TABLE OF CITED AUTHORITIES

Cases:

Armiliato v. Zaric-Armiliato,
169 F. Supp. 2d 230 (S.D.N.Y. 2001) 3

Bekier v. Bekier, 248 F.3d 1051 (11th Cir. 2001) 4

Feder v. Feder, 866 F. Supp. 860 (E.D.Pa. 1994) 3

Murphy v. Hunt, 455 U.S. 478 (1982) 5

Ohlander v. Larson, 14 F.3d 1531 (10th Cir. 1997) 3

Norden-Powers v. Beveridge,
125 F. Supp. 2d 634 (E.D.N.Y. 2000) 3

Silverman v. Silverman, 267 F.3d 788 (8th Cir. 2001) . . 3

Weinstein v. Bradford, 432 U.S. 147 (1975) 5

Statutes:

Children (Scotland) Act 1995 2

Treaties:

Hague Convention on the Civil Aspects of International Child Abduction, Done at the Hague on October 25, 1980, T.I.A.S. No. 11,670, *instrument of U.S. ratification deposited* April 29, 1988, S. Treaty Doc. No. 99-11, *reprinted in* 19 I.L.M. 1501 (1980). 1, 2, 3

Miscellaneous:

Procès-verbal No. 11, at 325, *reprinted in* III Actes et Documents de la Quatorzieme Session, Child Abduction (1982). 3

REPLY

Respondents do not dispute the key points in the Petition for Writ of Certiorari. Instead, they seek to divert the Court's attention with a series of misstatements and invalid arguments.

1. Respondents do not challenge Petitioner's key points: an overwhelming majority of courts interpret "rights of custody" under the Hague Convention to include a right to determine whether the child remains in the country of habitual residence, *see* Petition ("Pet.") 9-26; and Petitioner had had such a right (together with other significant rights) under Scots law, *see id.* at 16. *See also* Scottish Ministers Brief 10-19. Indeed, Respondents acknowledge that the issues presented by the Petition are "compelling." Br. in Opp. 6, 11.

2. Respondents contend, however, that "the record below does not contain evidence of an order prohibiting Mr. McRoberts from removing Travis from Scotland," and therefore "the question advanced . . . is not supported by this record or this decision." Br. in Opp. 5. This contention is utterly unpersuasive, for two reasons.

First, no "pre-removal order" is required under the Hague Convention:

> The rights of custody . . . may arise in particular *by operation of law* or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Convention, art. 3 (emphasis added). Thus, it is clear that rights of custody may arise under the Convention without any judicial order, by virtue of a statute or other source of law. It is also undisputed that the Children (Scotland) Act 1995 provides, "by operation of law," that removal of a child is prohibited without the consent of both parents. *See* Scottish Ministers Br. 5.

Second, Mr. McRoberts avoided the entry of a pre-removal order in this case by giving an undertaking to the Ayr Sheriff Court that he would not remove Travis from Scotland. *See* Pet. 6. Furthermore, the Sheriff Court entered a post-removal order declaring that the removal of Travis constituted a violation of both the Children (Scotland) Act 1995 and Mr. McRoberts' express undertaking. *See id.* The fact that there was not, in addition to all of these measures, an express pre-removal order by the Scottish court cannot possibly distinguish this case from other cases involving *ne exeat* provisions. The Court of Appeals did not even suggest any such distinction. *See* Pet. App. 24a.

3. Respondents other major contention is that Petitioner or the Scottish Government should have sought a determination under Article 15 of the Hague Convention that Travis's removal was wrongful, and their failure to do so should be regarded as a waiver of any right to object to the Court of Appeals' decision. Br. in Opp. 3-4, 10. This line of argument entirely misconstrues the clear language of Article 15, which provides that the "judicial and administrative authorities of a Contracting State" (here, the United States) may, in their discretion, "request that the applicant obtain from the authorities of the State of habitual residence of the child a decision or other determination that the removal or retention was wrongful . . . ." Convention,

art. 15. Article 15 allowed, but did not require, the U.S. District Court to request such a determination from the appropriate Scottish authorities. Petitioner was neither obligated nor permitted to make such a request unilaterally.

The suggestion that the Petitioner declined to pursue an Article 15 request for some strategic purpose is completely at odds with her extensive efforts to have Travis returned to Scotland, her own sworn application, the orders of the Ayr Sheriff Court holding Mr. McRoberts in contempt and in violation of the Children (Scotland) Act 1995 and his own express undertaking to the Scottish court that he would never remove the child from Scotland. The District Court no doubt concluded that such evidence sufficiently established the wrongfulness of the child's removal from Scotland and that no Article 15 determination from Scotland was necessary.

The District Court's action is in accord with the generally accepted view that the summary return mechanism would be unnecessarily delayed if courts were to seek an Article 15 statement in every Hague Convention case. Just such a possibility was a particular concern of delegates at the XIVth Session. *See Procès-verbal* No. 11, at 325, *reprinted in* III Actes et Documents de la Quatorzieme Session, Child Abduction (1982).[1]

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[1] Petitioner has found only five cases, among the many reported cases in the U.S. concerning the Hague Convention, that even mention Article 15 statements, and the Article 15 statement did not determine the outcome in any of those cases. *See Silverman v. Silverman*, 267 F.3d 788, 791 (8th Cir. 2001); *Ohlander v. Larson*, 14 F.3d 1531, 1545 (10th Cir. 1997); *Armiliato v. Zaric-Armiliato*, 169 F. Supp. 2d. 230, 235 (S.D.N.Y. 2001); *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 636-637 (E.D.N.Y. 2000); *Feder v. Feder*, 866 F. Supp. 860, 866 (E.D. Pa. 1994).

In short, Respondents' Article 15 argument is clearly invalid, and their heavy reliance on this argument simply underscores their effort to avoid the core issues in this case.

4. Respondents incorrectly assert that Petitioner is seeking to extend the right of return to cases involving only "the breach of rights of access." Br. in Opp. 1. This simply mischaracterizes Petitioner's argument. It is common ground that the Convention provides a right of return only if the child is removed in breach of "rights of custody." The issue is whether the right to veto the child's removal from the country of habitual residence falls within the broad definition of "custody rights" found in Article 5 of the Convention. Many Contracting States have considered this question and an overwhelming majority have answered it in the affirmative. *See* Pet. 25-26 n.5.

5. Respondents misunderstand the essence of the Convention in advancing the argument that Ms. Fawcett did not possess custody rights because she could not determine the child's residence within Scotland. In fact, whether or not it was ever conceded that the mother did not have the right to determine the child's residence within Scotland is irrelevant. It is the Petitioner's right to veto Travis' removal from Scotland and establish residence in another country that is paramount under the Convention.

6. Finally, Respondents' effort to side-step a circuit conflict on the mootness issue is unconvincing. Contrary to Respondents' assertion (Br. in Opp. 7), the Court of Appeals did not view the Eleventh Circuit's decision in *Bekier v. Bekier*, 248 F.3d 1051 (11th Cir. 2001), as distinguishable. The Court of Appeals distinguished the cases on which *Bekier* relied, but not *Bekier* itself. *See* Pet. App. 14a-15a & n.2. Respondents suggest three grounds for distinguishing *Bekier*:

Respondents in this case were not represented by counsel; the issue in this case is "capable of repetition yet evading review"; and Respondents in this case were ordered to pay Petitioner's attorneys' fees. Br. in Opp. 8-9. As to the first point, Respondents were in fact represented by counsel at the hearing before the District Court, and in any event it is difficult to see how the presence or absence of counsel can breathe life into an otherwise moot controversy. As to the second point (which, if true, would apply equally to *Bekier*), the issue is not one that will evade review in future cases, because parties in Respondents' position are always free to seek a stay pending appeal (and, if necessary, to seek appellate review of the denial of a stay). Moreover, this is not a class action, and it is not clear that Respondents are likely to find themselves in the same situation again. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (in the absence of a class action, there must be a likelihood that the same controversy will recur involving the same complaining party); *Weinstein v. Bradford*, 432 U.S. 147, 149 (1975) (same). And as to the third point, even assuming there was no attorneys' fee award in *Bekier* (perhaps a doubtful assumption in view of Respondents' own admission a fee award is "arguably mandatory under the International Child Abduction Remedies Act)," the Court of Appeals plainly did not limit itself to deciding the attorneys' fees issue. Br. in Opp. 8. To the contrary, the Court of Appeals consigned that issue to a footnote; the text of its opinion discusses at length the wider scope of its decision. Pet. App. 18a-20a & n.3 Given the importance of the mootness issue, its recurring nature, and the Solicitor General's prior suggestion to this Court that the return of a child under the Convention renders the case moot, *see* Pet 30, it also merits the Court's review.

CONCLUSION

Every pronouncement and order from the Ayr Sheriff Court and every aspect of the relevant Scots statutory law confirm that the Court of Appeals chose to ignore the valid and undisputed Scottish orders and condone the unilateral and unlawful removal and concealment of the Petitioner's child in this country. Nothing in the Respondents' arguments explain this erroneous interpretation of international law. Nothing in the Respondents' arguments even attempt to explain why the Court of Appeals can take a position with respect to *ne exeat* statutory restrictions that is not only contrary to fundamental rights under Scots law but contrary to the overwhelming international precedent. For these compelling reasons, certiorari should be granted in the present case.

Respectfully submitted,

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